

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE**

Del R. Gilbert & Son Block Co., Inc.

v.

Civil No. 08-cv-504-PB

Allan Block Corporation

O R D E R

Plaintiff moves to amend its complaint to add a new cause of action based upon allegations that defendant's patents have been held invalid. Defendant's objection is based on a futility argument, namely that the patents have not been invalidated. Only a number of "claims" were invalidated.

The precise allegation in the amended complaint is:

"78 . . . neither of Allan Block's patents remains in force . . .".

Neither party addressed directly whether the '236 patent is really enforceable when several of its claims have been held invalid. See Allan Block Corporation v. County Materials Corp., 2008 WL 5273730, *17 (D. Minn.). Judge Erickson said that "Allan Block does not dispute county's assertion that the '010 Patent expired . . ." Id., at *8. An allegation that they are not "in force" has a basis.

Under the circumstances, it is not clear that the amendment is futile. The motion (document no. 10) is granted.

SO ORDERED.



James R. Muirhead
United States Magistrate Judge

Date: May 13, 2009

cc: Jeffrey C. Spear, Esq.
Matthew R. Johnson, Esq.